

HIGH COURT OF CALCUTTA**Bench: Hon'ble Justice Debanshu Basak , Hon'ble Justice Bibhas
Ranjan De****Date of Decision: 9th April 2024****CRIMINAL APPELLATE JURISDICTION
[CIRCUIT BENCH AT PORT BLAIR]****CRA (DB)/1/2024, IA No. CRAN/1/2021, CRAN/2/2021****The State.Appellant****Versus****Shri Subhankar Bhakta & Others.Respondents****Legislation and Rules:**

Section 363, 376 of the Indian Penal Code,
Section 4 and 10 of the Protection of Children from Sexual Offence Act, 2012
(POCSO Act),

Subject:

This appeal challenges the acquittal of the respondents in a case involving alleged sexual offences against a minor, under Sections 363, 376 of IPC and Sections 4 and 10 of the POCSO Act.

Headnotes:

Acquittal in POCSO and IPC Case – Criminal Appeal against Trial Court's Acquittal Order – Minor's Alleged Sexual Assault – Acquittal by Trial Judge – The respondents were acquitted by the Trial Judge in Special Case No. 39/2019 (Special Trial No. 03 of 2019) – The case involved alleged sexual offenses against a minor – The Trial Judge found contradictions in evidence and deemed the survivor's testimony untrustworthy and unbelievable [Para 9].

Evidence Examination – Contradictions and Unreliability – The prosecution’s evidence, including that of the survivor (PW1) and her parents (PW2 and PW3), had inconsistencies and contradictions, specifically concerning the delay in reporting the incident and the locations where statements were recorded [Paras 13-17, 30.3, 30.6].

Medical Evidence – Assessment – No conclusive medical evidence indicating sexual assault; testimony of the doctor (PW 15) did not corroborate the prosecution’s narrative. [Para 25]

Delay in Filing FIR – Impact on Case – Notes significant 19-day delay in filing FIR. Finds the explanation of ‘family prestige’ by the survivor (PW1) insufficient and not substantiated by subsequent events. [Para 30.6]

Legal Principle – Presumption of Innocence and Appellate Review – Emphasizes the presumption of innocence in favor of the accused unless proven guilty. Asserts the duty of the Appellate Court to determine if Trial Court’s view is a possible one, not just a difference of opinion. Upholds the acquittal based on principles of criminal jurisprudence. [Paras 31-32]

Decision – Upholding of Acquittal – High Court finds no illegality, perversity, or error in the Trial Court’s judgement. Acquittal upheld due to insufficient evidence to convict the accused. Dismisses appeal with no costs. [Paras 32-33]

Referred Cases: None.

Representing Advocates:

For the State: Ms. A.S. Zinu, Advocate

For the Respondents: Mr. Deep Chaim Kabir, Advocate and Mr. D. Ilango, Advocate

BIBHAS RANJAN DE, J.

1. This appeal impugns the judgement and order of acquittal passed on 8th Day of January, 2021 by the learned Judge in Special Case No. 39/2019 (Special Trial No. 03 of 2019 dated 08/01/2021) under Section 363, 376 of Indian Penal Code read with Section 4 and 10 of the Protection of Children from Sexual Offence, Act 2012 (in short POCSO Act).

2. In view of the offences alleged attracting the provision of POCSO Act and in view of the guidelines of the Hon'ble Apex Court governing such scenario, we will consciously avoid to divulge the particulars of the survivor, witnesses and the Police Station, hospital, other places including place of occurrence.

FACTS:

3. The facts as reflected in the judgement of the Trial Judge are as follows:

One statement of survivor (for short S) was recorded by one lady Constable on 09.11.2018 at about 7:05 hours which was treated as complaint and was registered at Police Station under specific FIR dated 09.11.2018 under Section 376 IPC read with Section 5, 6 of POCSO Act.

4. S alleged that on 22.10.2018 she was going to attend private tuition and when she reached at a place the principal accused (for short P.A) met her with an Auto Rickshaw and told the S for dropping at her destination i.e. her private tuition. S boarded the Auto Rickshaw, but the P.A took her to a place instead of dropping her to the destination. Finally the P.A took the victim to a jungle and committed sexual relationship with her. Thereafter other four (4) accused persons came over there and asked the victim to make physical relationship with them. The S refused. They took photographs of the victim who felt vertigo. Thereafter S boarded an Auto Rickshaw and went to her house. She didn't disclose any of her family members on account of family prestige.

5. After registration of the case one S.I. of Police was entrusted with the investigation of this case. Upon completing the investigation, charge sheet was presented to the Trial Court for proceeding against the accused under Section 376 IPC read with Section 5, 6 of POCSO Act.

CHARGES

6. Learned Judge framed charge under Section 363, 376 IPC read with Section 4 of the POCSO act against the P.A and separate charge was framed under Section 10 of the POCSO Act against rest of the accused persons. All the accused pleaded not guilty to the said charges.

EVIDENCE OF THE CASE:

7. From the prosecution side nineteen witnesses were examined they are namely:

S as PW 1,

Mother of the S as PW 2,

Father of the S as PW 3,

The neighbor as PW 4

The watchman of PHC as PW 5,

An Auto Rickshaw Driver as PW 6,

An another Auto Rickshaw Driver as PW 7,

One person as PW 8,

One person as PW 9,

Another Auto Rickshaw Driver as PW 10,

Aaya attached with PHC as PW 11,

Nursing Officer posted at PHC as PW 12,

Relative of P.A as PW 13,

Friend of S as PW 14,

Medical Officer attached to PHC as PW 15,

Lady Constable attached to PS on the relevant day, as PW 16,

Staff Nurse attached to PHC as PW 17,

Sub Inspector attached to PS at the relevant point of time, as PW 18 and;

Investigating officer, as PW 19.

8. In course of evidence a good number of documents were admitted in evidence as Ext. 1 to 21.

FINDINGS OF THE TRIAL JUDGE

9. Learned Trial Judge after evaluation of evidence could not find any evidence of kidnapping within the meaning of Section 363 IPC and also noted the delay in lodging of complain before the police. After evaluation of the medical evidence and other evidence recorded in this case the learned Judge returned his findings that there were several contradiction in the evidence of prosecution and also found the evidence of S as untrustworthy, unreliable and unbelievable. Learned Judge also pointed out laches on the part of the Investigating Officer including the identification of place of occurrence.
10. Consequent to the above discussion Trial Judge recorded an order of acquittal in respect to all accused of the charges framed in this case.
11. Mr. Deep Chaim Kabir, learned counsel appearing on behalf of the respondents has strenuously contended that learned Trial Judge rightly evaluated the evidence and found several contradiction including abnormal delay which is fatal to the prosecution case. Mr. Kabir has further contended that there was no consistency in the statements of S on different occasion. Accordingly Mr. Kabir submitted that this Court cannot interfere with the view taken by the learned Trial Judge unless this Court finds any illegality or perversity in the judgement, even if there exists another view that led to the conviction of the accused.
12. Ms. A.S.Zinu, learned advocate appearing on behalf of the appellant/State has drawn our attention to the evidence adduced by the prosecution and submitted that there is no reasons to disbelieve the evidence of S in a case for the offence under Section 376 of the Indian Penal Code read with Section 4 of the POCSO Act. Ms. Zinu has further submitted that prosecution had succeeded to adduce evidence to give a support to the evidence of S. Before parting, Ms. Zinu submitted that learned Trial Judge failed to appreciate the evidence adduced on behalf of the prosecution and returned his wrong findings.

OUR VIEW

13. Initial statement made by S (PW 1) before the Lady Police Constable attached to PS was treated as FIR and case was registered. In that complaint she stated that she used to talk with the P.A over phone and on 22.10.2018 in the evening she was standing at a place to avail an Auto Rickshaw to go to tuition while P.A came with an Auto Rickshaw and told her to go to tuition alongwith him in that Auto Rickshaw. She refused but ultimately she had to sit in the Auto Rickshaw. Thereafter she was taken to a place wherefrom she was taken to a forest inspite of repeated refusal he made sexual relationship with her. When she was wearing her apparels other four accused came to the spot and asked for physical relationship with them, otherwise they would tell everyone. Other accused sexually assaulted her and she felt dizzy. Thereafter S and P.A boarded an Auto Rickshaw. On the way P.A got down at a place and she reached her house at 7 P.M. She didn't disclose the incident to any of her family members. It was specific allegations of S that the P.A made physical relationship with her forcibly and other accused also wanted to have physical relationship with her. S disclosed all the incident to her mother for the first time on 08.11.2018.
14. PW 6 (Auto Rickshaw Driver) has specifically testified that one boy and one girl stopped his Auto Rickshaw near a place at about 4 P.M. to 4:30 P.M. and boarded the said Auto Rickshaw. He dropped them at a place of a turning point. Therefore, the statement of S regarding entry of P.A at the place on the alleged date of incident has not been corroborated by PW 6.
15. Mother of the S (PW 2) has stated that on the alleged date of incident her daughter came to house by an Auto Rickshaw and she had noticed mud strain on her wearing apparels and after entering into the house her daughter took bath. From then on her daughter was not behaving a normal way and not taking proper food. On repeated query she disclosed nothing. Ultimately on 08.11.2018 she disclosed all the incident to her. On the next date i.e. on 09.11.2018 her husband PW 3 went to Police Station. Police recorded statement of her daughter in their house in presence of PW 2 and PW 3. She also accompanied her daughter to Primary Health Centre and at the time of incident her daughter was below the age of eighteen years. Police seized the original birth certificate. Both PW 1 and PW 2 gave their statement under Section 164 Cr.P.C before the Magistrate.

16. In a cross-examination PW 2 has stated that statement of her daughter was not recorded in their house, but might have been recorded at Police Station.
17. Father of the S (PW 3) stated that on 08.11.2018 his wife (PW 2) disclosed all the incident alleged to have been happened on 22.10.2018. In his examination-in-chief he stated about alleged incident. He reported the matter to Police Station. He stated that SHO of Police Station along with other police personnel came to his house and recorded the statement of his daughter in presence of his wife (PW 2). Police seized Birth Certificate of his daughter and he signed seizure list. He was not present at the time of recording of statement of his daughter. He further specifically deposed that he did not take his daughter to hospital because she did not sustained any injury. In a cross-examination PW 3 also stated that his wife did not disclosed the name of the four boys.
18. Therefore, there is a lack of consistency between the evidence of PW 2 and PW 3 regarding the place where the statement of S was recorded i.e. either at the Police Station or at their house. From the evidence of PW 7 (another Auto Rickshaw Driver) who deposed on 29.03.2019 before the Court that about six months ago at 5 to 5:30 P.M. when he was returning to a place after dropping a passenger at a distance place a girl stopped the Auto at a place in the middle portion and one boy boarded his Auto Rickshaw. The boy got down at one place and he dropped the girl at her village. None of the Auto Rickshaw drivers (PW 6 and PW 7) could identify the boy before the Court.
19. PW 4 proved the seizure of birth certificate. PW 5 proved the seizure of sample collected from five boys by the Doctor (PW 15). PW 8 and PW 9 were present at Police Station at the time of seizure of two bus tickets.
20. On careful scrutiny of PW 10, another Auto Rickshaw driver who deposed on 18.07.2018 before the court as that at about 8-9 months ago he was standing in the parking of a Jetty. In the evening one boy asked him to go to a place. He proceeded for that place with that boy one girl also boarded his Auto at a place and both of them step down at a particular place. But he was unable to identify the person who boarded his Autorickshaw on that day. He stated about the name of the village of S.

21. The aforesaid evidence of PW 10 is a clear denial of statement of S (PW 1) who stated that she was taken to the alleged place of occurrence by the P.A by an Auto Rickshaw.
22. PW 11, Aaya attached PHC, has testified that on 09.11.2018 she remained on night duty at PHC and Doctor (PW 15) medically examined the S in her presence. Vaginal swab was collected and handed over to the Police, who seized the same in a seizure list. She identified her signature therein. PW 12, a Nursing officer attached to PHC, also testified that on 10.11.2018 she was on night duty while P.A was examined by PW 15. She also put signature on the seizure list in respect of biological sample.
23. PW 13, relative of P.A, stated that he was examined by Police and he handed over the bus tickets to police, police seized the same. In cross-examination he has stated that he had travelled from Port Blair by an express bus. He has further testified that on that day P.A also travelled with him from Port Blair to a particular place on the way.
24. PW 14, a friend of S, has deposed that she used to attend private tuition along with S. She couldn't say anything about this case. She further stated that S used to talk with someone over her mobile.
25. PW 15, Doctor examined S on 09.11.2018 at 8 P.M. and S was aged about 17 years and 5 months. S stated before the Doctor that She went to a village with P.A and had a physical relationship with him. She had denied first, but ultimately agreed. Four more boys came there but they did not hurt her. However, doctor found no mark of injury either on her body or genital region. Hymen was ruptured. She prepared report (Ext-2). On 09.11.2018 at about 11:20 P.M. doctor also examined one accused and prepared medical examination report (Ext-14). On the same date at about 11:30 P.M. she examined another and prepared report (Ext-15). On the same date she also examined other two accused including P.A and prepared their medical reports (Ext-16 and Ext-17).
26. PW 16, lady Constable attached to Police Station, recorded statement of S in presence of her mother at her residence and read over and explained to the S.

27. PW 17, a staff nurse attached to PHC, has deposed that on 09.11.2018 Doctor (PW 15) examined S in her presence.
28. PW 18, SHO of Police Station, has stated that on 09.11.2018 he received a telephonic information regarding sexual assault on minor girl. After getting information he sent one LPC along with police party to the house of S. She recorded the statement of S there. On the basis of that statement SHO registered the FIR on 09.11.2018 under Section 376 IPC read with Section 5 (g)/6 of the POCSO Act against all five accused including P.A. He entrusted investigation of the case with one Sub Inspector of Police.
29. PW 19, Investigating Officer of this case, visited the place of occurrence, prepared rough sketch map with index (Ext-20) and took photograph of place of occurrence (Ext-21) with objection. He recorded statement of witnesses under Section 161 Cr.P.C and seized birth certificate of S under seizure list (Ext-4). He collected medical report and produce S before Magistrate for recording statement 164 of Cr.P.C. He arrested all accused. After completion of investigation he submitted charge sheet under Section 376 IPC read with Section 6 of the POCSO Act. In cross-examination PW 19 has testified that no reasons of the delay was mentioned specifically in the FIR.
30. Summarizing the entire evidence, our conclusion, therefore, are thus:
 - 30.1. S was sufficiently grown up. At the relevant point of time she was aged more than seventeen years and a student of class XII.
 - 30.2. Three Auto Rickshaw drivers (PW 6, PW 7 and PW 10) belied that entire theory of kidnapping alleged in this case.
 - 30.3. After perusal of the evidence of Mother of the victim (PW 2), Father of the victim (PW 3) and Lady Police Constable (PW 16) it cannot be ascertain that where the statement of VG was recorded either at Police Station or in the house of PW 3.
 - 30.4. S stated before the Doctor (PW 15) that four boys did not hurt her. That apart there was no explanation in the evidence that how those four boys appeared at the scene of occurrence which was alleged to have been taken place in the jungle at a distance place.

- 30.5. Investigating Officer, in course of his evidence, has testified that he visited place of occurrence and took photo graphs. But no evidence was adduced as to the person who actually identified the place of occurrence to Investigating Officer.
- 30.6. The incident alleged to have been occurred on 22.10.2018 and FIR was lodged on 09.11.2018. This delay of 19 days was explained by the S in course of her evidence by saying that she could not disclose the incident to her Mother before 08.11.2018 because of 'family prestige'. But throughout her evidence she never explained what prompted her to disclose such serious incident to her Mother on 08.11.2018 for the first time ignoring the 'family prestige'.
31. The cardinal principle of criminal jurisprudence is a presumption of innocence in favour of the accused, unless proven guilty. The presumption continues at all stages of the trial and finally culminates into a fact when the case ends in acquittal. The presumption of innocence gets concretized when the case ends in acquittal. It is so because once the Trial Court, on appreciation of evidence on record, finds that the accused was not guilty, the presumption gets strengthened and a higher threshold is expected rebut the same in appeal. Though appreciation of evidence is a qualified power of this Court in appeal but at the same time it is the duty of the Appellate Court to find out whether Trial Court thoroughly appreciated the evidence on record and gave due consideration of all material pieces of evidence. Appellate Court has also bounden duty to find out whether the view taken by the Trial Court is a fairly possible view or not. A decision of acquittal is not meant to be reversed on a mere difference of opinion. What is required is an illegality or perversity. The Appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the Trial Court.
32. In our considered view, the view taken by the Trial Court was possible view and there being no error in correct and complete appreciation of evidence as also application of law. Therefore, we find no justification to interfere with the judgement impugned in this appeal.
33. In the aforesaid view of the matter, appeal stands dismissed. No costs. The pending applications, if there be any, stand disposed of accordingly.

34. All respondents are directed to submit a bond of Rs. 5000/- each with one surety of like amount to the satisfaction of learned Chief Judicial Magistrate, Port Blair and on condition to appear before the next higher forum as and when notice issued by higher forum in respect of any appeal upon being file against this judgement. The bail bond shall remain in force for six months.
35. The Lower Court Record be transmitted back to the Trial Court along with a copy of this judgement.
36. Urgent photostat certified copy of this order, if applied for, shall be supplied to the parties upon compliance of all formalities.

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